

No. 77406-4

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

DOUG SCOTT, LOREN TABASINSKE & SANDRA TABASINSKE,

Petitioners,

v.

CINGULAR WIRELESS LLC,

Respondent.

BRIEF OF *AMICUS CURIAE*
ASSOCIATION OF WASHINGTON BUSINESS

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I. INTRODUCTION

The Association of Washington Business submits this brief as *amicus curiae* because the issues presented by this case are of critical importance to a wide variety of Washington businesses. In recent years, businesses and consumers throughout the United States have successfully turned to arbitration as a quick and economical method of resolving commercial disputes. AWB has been a leading proponent not only of arbitration as an important instrument of alternative dispute resolution, but also of public policies that will keep Washington an attractive place to do business. In this case, AWB sees the two policies dovetailed. On the one hand, it would be unsound legal and public policy for our state to turn its back on a longstanding and common-sensical practice of arbitrating consumer disputes. On the other hand, it would impair Washington's competitiveness and the resulting ability to generate jobs for Washingtonians if our state's legal climate signals to businesses that it differs from the vast majority of other states regarding the enforceability of consumer-friendly arbitration agreements.

The order of the Superior Court compelling arbitration, accordingly, should be affirmed.

II. IDENTITY AND INTEREST OF *AMICUS CURIAE*

AWB, founded in 1904, is the state's oldest and largest general business organization. AWB represents approximately 5,500 businesses and organizations of every size which engage in all aspects of commerce in Washington and which employ over 650,000 Washingtonians. AWB members are involved in every sector of Washington's economy and operate within Washington state, across the United States, and around the world. A central function of AWB is to represent the vital public policy interests of its members before the legislative, executive, and judicial branches of government in Washington. As a result, AWB frequently files *amicus curiae* briefs before this court and the lower appellate courts of the state in matters of substantial importance to the business community, including the public policy supporting arbitration. *See, e.g., Zuver v. Airtouch Communications, Inc.*, 153 Wn.2d 293, 103 P.3d 753 (2004); *Adler v. Fred Lind Manor*, 153 Wn.2d 331, 103 P.3d 773 (2004).

The day to day operation of a commercial society relies on stable and predictable rules safeguarding the ability of parties to freely enter into contracts. Numerous AWB members call for the arbitration of disputes that arise from their consumer, insurance, employment, or other commercial contracts. Arbitration is a quick, fair, and reasonably priced alternative to litigation for consumers and businesses alike, and AWB

strongly supports Washington's public policy favoring arbitration of disputes. AWB members believe that many of the mutual benefits of arbitration would be lost, however, were the Court to rule that the judicial procedure of class actions can displace alternative dispute resolution. AWB members therefore agree with the decision of the trial court and Court of Appeals upholding Cingular's consumer-friendly arbitration clause, and seek to address its views to this Court.

III. ISSUES OF CONCERN TO *AMICUS CURIAE*

A. Did the trial court err in holding that Cingular's arbitration clause was not formed in a procedurally unconscionable manner and thus is enforceable as a matter of Washington contract law? *Cf. Opening Br. of App.* at 1 (Issue 1).

B. Did the trial court err in holding that Cingular's arbitration clause is not substantively unconscionable and thus is enforceable as a matter of Washington contract law? *Cf. Opening Br. of App.* at 1 (Issue 2).

IV. STATEMENT OF THE CASE

For the sake of brevity, *amicus curiae* adopts the Statement of the Case set forth by Respondent. *Br. of Resp't* at 2-8.

V. ARGUMENT

AWB's argument is based upon four straightforward points. First, Washington has a long and proud public policy tradition of favoring arbitration of disputes, a policy which would be threatened by petitioners' misguided attack on arbitration. Second, in rejecting that attack, the Court should note that arbitration agreements that act as waivers of the class action procedure are not, *ipso facto*, substantively unconscionable. Third, though Cingular's consumer-friendly arbitration provision acts as a waiver of the class action procedure, it most certainly passes muster under this Court's very recent iterations of the standard for substantive unconscionability. Finally, the Court should reject petitioners' effort to achieve by litigation a result that essentially requires a legislative amendment to state and federal arbitration laws and should be left to the province of the legislative, rather than judicial, branch.

A. THE COURT SHOULD AGAIN REITERATE WASHINGTON'S STRONG PUBLIC POLICY FAVORING ARBITRATION OF DISPUTES.

The Federal Arbitration Act, 9 U.S.C. §§ 1-16, makes clear that it is the public policy of the United States of America to enforce private agreements to arbitrate disputes. 9 U.S.C. § 2. "Section 2 is a congressional declaration of a liberal federal policy favoring arbitration agreements, notwithstanding any state substantive or procedural policies

to the contrary.” *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24, 103 S. Ct. 927, 74 L. Ed. 2d 765 (1983) (citing *Prima Paint Corp. v. Flood & Conklin Mfg. Corp.*, 388 U.S. 395, 87 S. Ct. 1801, 18 L. Ed. 2d 1270 (1967)). “The effect of the section is to create a body of federal substantive law of arbitrability applicable to any arbitration agreement within the coverage of the Act.” *Id.* Both state and federal courts must enforce this body of substantive arbitrability law. *Perry v. Thomas*, 482 U.S. 483, 489, 107 S. Ct. 2520, 96 L. Ed. 2d 426 (1987) (citing *Southland Corp. v. Keating*, 465 U.S. 1, 11-12, 104 S. Ct. 852, 79 L. Ed. 2d 1 (1984)). Doubts as to arbitrability are to be resolved “in favor of arbitration, whether the problem at hand is the construction of the contract language itself or an allegation of waiver, delay, or a like defense to arbitrability.” *Moses H. Cone Mem'l Hosp.*, 460 U.S. at 25.

Washington law is entirely in agreement. *See, e.g., Zuver*, 153 Wn.2d at 301 (noting strength of federal and state public policies supporting arbitration); *Adler*, 153 Wn.2d at 341-42 (same); *Boyd v. Davis*, 127 Wn.2d 256, 262, 897 P.2d 1239 (1995) (noting that encouraging parties to voluntarily submit their disputes to arbitration is an increasingly important objective in our ever more litigious society); *Perez v. Mid-Century Ins. Co.*, 85 Wn. App. 760, 765, 934 P.2d 731 (1997) (recognizing a strong public policy in Washington favoring arbitration of

disputes); *Clearwater v. Skyline Constr. Co.*, 67 Wn. App. 305, 314, 835 P.2d 257 (1992), *rev. denied*, 121 Wn.2d 1005, 848 P.2d 1263 (1993) (same); *Munsey v. Walla Walla College*, 80 Wn. App. 92, 94-95, 906 P.2d 988 (1995) (recognizing the strong public policy favoring arbitration of disputes and noting that arbitration eases court congestion, provides an expeditious method of resolving disputes and is generally less expensive than litigation); *King County v. Boeing Co.*, 18 Wn. App. 595, 602- 03, 570 P.2d 713 (1977) (same); *Barnett v. Hicks*, 119 Wn.2d 151, 160, 829 P.2d 1087 (1992) (noting that the object of arbitration is to avoid the formalities, delay, expense and vexation of ordinary litigation).

As fundamental as the public policies of informality, expeditiousness, inexpensiveness and judicial economy are, it should not be forgotten that agreements to arbitrate are voluntary and private. There are equally strong policy grounds favoring the enforcement of the free and consensual right of parties to contract for the alternative resolution of disputes. *See, e.g., EEOC v. Waffle House, Inc.*, 534 U.S. 279, 294, 122 S. Ct. 754, 151 L. Ed. 2d 755 (2002) (“[T]he FAA is ‘at bottom a policy guaranteeing the enforcement of private contractual arrangements.’”) (*quoting Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 625, 105 S. Ct. 3346, 87 L. Ed. 2d 444 (1985)).

The public policies supporting arbitration would be lost were this Court to impose the judicial class action procedure upon it. This is all the more true when parties contract to submit disputes to a resolution mechanism that by its nature and purpose precludes later resort to class treatment. AWB believes that in compelling arbitration, the trial court properly respected the policy goals underlying the arbitration contract and urges this Court, like the Court of Appeals, to affirm that order.

**B. AN ARBITRATION CLAUSE THAT ACTS AS A
WAIVER OF THE CLASS ACTION PROCEDURE IS
NOT *PER SE* UNCONSCIONABLE.**

Underlying the petitioners' argument is the suggestion that an arbitration clause that acts as a waiver of the class action procedure is effectively unconscionable. *Opening Br. of Pet.* at 16, 21. Not only has that view been rejected by the courts of a majority of other states, *Supp. Br. of Resp't* at 3-6, the courts of this state have rejected it as well.

In *Stein v. Geonerco, Inc.*, 105 Wn. App. 41, 48-49, 17 P.3d 1266, discussed by respondent in its response brief below at 15-16 (but curiously omitted from petitioners' briefing), Division I of the Court of Appeals considered as a matter of first impression the enforceability of an arbitration agreement solely because it precluded plaintiff from bringing a class action. *Stein*, 105 Wn. App. at 48. *Stein* involved a consumer protection claim brought by a homebuyer against his contractor alleging

construction defects but subject to a consumer warranty containing an arbitration clause. Writing for the panel, Judge Webster concluded that “[b]ecause the arbitration clause here is silent on class action and Stein has failed to demonstrate a conflict with statutory provisions, contract law, or due process requirements, we enforce the clause as written.” *Stein*, 105 Wn. App. at 49. The *Stein* court found nothing wrong with the practical effect of an arbitration agreement defeating a class action procedure, even where the agreement was silent on class actions. In this case, Cingular’s arbitration clause specifically calls attention to its effect on class actions. If the *Stein* clause did not conflict with contract law – unconscionability is a general defense to contract,¹ although it was not specifically at issue in *Stein* – it follows that Cingular’s provision does not conflict with contract law. Rather, it would turn contract law upside down for the Court to hold, for the first time in Washington, that an arbitration provision barring class actions is per se unconscionable.

Division II confirmed *Stein* two years later, as respondent points out, in *Heaphy v. State Farm Mut. Auto. Ins. Co.*, 117 Wn. App. 438, 446-47, 72 P.3d 220 (2003). There, Heaphy sought to bring a class action alleging State Farm failed to properly compensate her for property

¹ See, e.g., *Zuver*, 153 Wn.2d at 302 (noting that unconscionability, like fraud and duress, is a general defense to contract); *Adler*, 153 Wn.2d at 342 (same).

damage under her underinsured motorist coverage. The insurance policy contained an arbitration agreement which Heaphy sought to avoid in order to proceed with a class action. Finding *Stein* controlling, the *Heaphy* court wrote that “Heaphy offers no persuasive argument why the law should be different [than in *Stein* where arbitration was properly compelled despite precluding class action]”. *Heaphy*, 117 Wn. App. at 447.

Lower courts have correctly determined the *per se* validity of arbitration agreements that act as waivers of the class action procedure. As in *Stein* and *Heaphy*, AWB believes that petitioners in this case have failed to provide a statutory, contract, or constitutional basis for voiding a voluntary agreement to resolve disputes through arbitration. This Court should apply the same burden and scrutiny to petitioners’ blanket claim of *per se* unenforceability that Division I and II applied to dispose of the same arguments.

**C. THE COURT SHOULD HOLD THAT CINGULAR’S
ARBITRATION CLAUSE IS NOT SUBSTANTIVELY
UNCONSCIONABLE.**

Whether Cingular’s specific arbitration clause is unconscionable is a key issue in this case, and AWB does not seek to belabor the Court or parties with a recitation of the same arguments and authorities Cingular adduces in support of its arbitration provision. AWB simply observes that the legal standard for a finding of substantive unconscionability is almost

hyperbolically high: “one sided,” “overly harsh,” “shocking to the conscience,” “monstrously harsh,” “exceedingly calloused.” *Zuver*, 153 Wn.2d at 202. Cingular’s consumer-friendly arbitration provision, by contrast:

- Provides that Cingular pays all filing, administrative and arbitration fees, unless the arbitrator finds the claims frivolous;
- Obliges Cingular to reimburse reasonable attorney’s fees and costs incurred for the arbitration if the customer recovers the amount of the demand or more;
- Requires the arbitration to take place in the county where the customer lives;
- Does *not* preclude resort to small claims court for appropriate claims;
- Does *not* require confidentiality;
- Does *not* limit punitive damages;
- Does *not* appear in fine print;
- Does *not* fail to emphasize important terms;
- Does *not* impose separate forum requirements on Cingular and the customer; and
- Does *not* create an insuperable financial barrier to customers who want to pursue claims. *Cp. Luna v. Household Finance Corp. III*,

236 F. Supp. 2d 1166, 1179 (W. D. Wash. 2002) (finding arbitration provision unconscionable where it imposes prohibitive costs upon claimant's pursuit of relief).

In light of the circumstances surrounding Cingular's specific arbitration clause, AWB submits that a finding that *this* clause is substantively unconscionable would effectively accomplish petitioners' objective of having *all* arbitration clauses that preclude class action procedures held *per se* unconscionable. For if such a consumer-friendly clause is "monstrously harsh" or "shocking to the judicial conscience," it will be quite challenging, if not impossible, for businesses and consumers to depend upon enforceable arbitration clauses in the future. Such a holding would simply defeat the entire body of public policy supporting arbitration as a fast, fair, and economical vehicle for the disposition of contract claims.

**D. MAJOR ALTERATIONS OF THE RIGHT TO
ARBITRATE DISPUTES SHOULD BE PROPOSED IN
THE LEGISLATIVE RATHER THAN JUDICIAL
BRANCH.**

As the parting shot in their supplemental brief, petitioners contend that "there is nothing radical about barring corporations from prohibiting their customers from bringing or participating in class actions." *Supp. Br. of Pet. at 19-20*. Petitioners go on to find significance in the fact that

arbitration agreements among telecommunication companies only arose after federal deregulation provisions took effect over the last decade and that the securities industry provides for a system for arbitration that also allows class action claims. Petitioners conclude, “it would hardly be a radical step if the effect of this Court’s decision is to replicate this core element of the NASD’s system for cases involving small individual claims.” *Supp. Br. of Pet.* at 20.

AWB respectfully disagrees. First of all, it would be a radical departure from the jurisprudence of this state and the overwhelming majority of other states to allow petitioners and their special interest legal counsel to achieve by litigation a result that has not been achieved in the legislative branches of government, viz., a fundamental alteration of the Federal Arbitration Act and the many state codes and cases that complement and coexist with the FAA.

Secondly, the court in *Stein* specifically considered and rejected as unpersuasive and inapposite the arbitration procedure adopted by the National Association of Security Dealers (“NASD”). *Stein*, 105 Wn. App. at 49 n. 1 (“NASD rules obviously do not apply to this case.”). NASD rules obviously do not apply to this case, either, and are unpersuasive as a model for resolution.

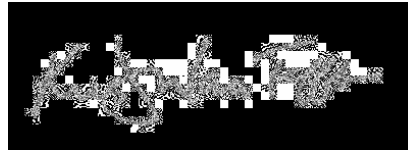
Finally, and most fundamentally, if the objective of petitioners' litigation is to "replicate this core element of the NASD's system for cases involving small individual claims," the proper venue for such an argument is the United States Congress or the Washington State Legislature, where the political branches of government can take comprehensive note of the competing interests and stakeholders associated with such a proposal. Because such fundamental re-ordering of the arbitration system in our state (and country) is legislative in nature, it is not for a court to decide. The Court should uphold as a model arbitration provision the consumer-friendly clause voluntarily entered into between Cingular and its customers, while pointing out that arbitration provisions that act to preclude class actions are not *per se* unconscionable and do not, on their face, preclude consumers from redressing claims arising from the contracts which contain them.

VI. CONCLUSION

For the reasons set forth above, *amicus curiae* AWB asks the Court to uphold the disputed arbitration clause and affirm the lower courts' orders compelling arbitration.

Respectfully submitted this 27th day of January, 2006.

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